

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JAMES KUYKENDALL and
DONNA KIRKWOOD,
Plaintiffs

v.

LIBERTY INSURANCE CORPORATION,
Defendant

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CIVIL ACTION NO. 1:23-CV-00113-SH

PLAINTIFFS' FIRST AMENDED COMPLAINT

TO THE HONORABLE UNITED STATES MAGISTRATE JUDGE:

James Kuykendall and Donna Kirkwood, Plaintiffs, respectfully files this first amended complaint complaining of Liberty Insurance Corporation, ("Liberty") and would show:

PARTIES

1. Plaintiff James Kuykendall is an individual residing in Travis County, Texas.
2. Plaintiff Donna Kirkwood is an individual residing in Travis County, Texas.
3. Defendant, Liberty Insurance Corporation, is a foreign insurance company doing business in the state of Texas that has been served and made appearance in this action.

JURISDICTION AND VENUE

4. **Jurisdiction.** The Court has original jurisdiction of this civil action pursuant to 28 U.S.C. § 1332 because the matter in controversy exceeds the sum or value of \$75,000.00, exclusive

of interest and costs, and there is complete diversity of citizenship between the Plaintiffs and Liberty.

5. **Venue.** Venue is proper in this district and division pursuant to 28 U.S.C. § 1391(b)(1), as a substantial part of the events or omissions giving rise to the Plaintiffs' claims occurred here.

OPERATIVE FACTS

6. On or about May 9, 2021 a storm caused tree limbs to come down on the roof of the property owned by Plaintiffs located at 2335 FM 504, Lohn, Texas 76852 (the "Property"). On May 14, 2021 J and JK Construction and Excavating, LLC removed the tree limb from the roof of the house for \$1,350.00 as well as moving a fallen tree away from the side of the house where it is still sitting present day. J and JK Construction tried to rent equipment large enough to do the job in Brady, Texas but none of the companies had anything big enough. J and JK Construction had to go to Austin to get the necessary equipment large enough to complete the job which was 127 miles to Austin and then another 127 miles to return the equipment. On September 25, 2021 Ronald McBee provided additional services for removing tree limbs from the property and house for \$37,040.12 at which time additional wind, hail, and tree limb damage to the roof was discovered.

7. Mr. Kuykendall filed a claim with Liberty Mutual on September 27, 2021. Dandra Cooper was assigned to the claim. On October 6, 2021 Heart of Texas Restoration did an initial assessment for water mitigation and estimated an amount of \$3,079.41. The following week Heart of Texas completed a restoration mitigation photo report on the Property.

8. On October 24, 2021 a second storm hit the Property causing further damage and a downed tree hit the house. The tree also fell onto the power line pulling it down and out of the

house in addition to hitting the front right corner of the roof and house. J and JK Construction completed another tree removal for the price of \$1,350.00 on November 5, 2021. To date, the power company has refused to reconnect the power due to the extensive wiring damage to the house. Mr. Kuykendall and Ms. Kirkwood received a check from Liberty Mutual for the amount of \$10,952.78 which they have not cashed.

9. Plaintiffs have provided Liberty Mutual with an estimate from Ronnie McBee Construction in the amount of \$134,648.84.

10. On or about October 25, 2022 Plaintiffs sent a demand to Liberty Mutual for the outstanding amount of \$134,648.84 pursuant to Texas Insurance Code Section 542A. Liberty Mutual has not responded, requested any additional documentation or information, or paid.

CAUSE OF ACTION

11. **Breach of Contract:** Liberty's actions amount to a breach of the contract between Plaintiffs and Liberty. Plaintiffs applied for and was accepted for homeowner's insurance coverage by Liberty. Plaintiffs paid the required premiums, entering into a binding contract for insurance with Liberty. Liberty breached the contract by partially denying and refusing to pay the above-referenced claims. Plaintiffs are entitled to recover their actual damages, court costs and reasonable and necessary attorney's fees pursuant to Texas Civil Practice & Remedies Code, Section 38.001, et seq.

12. **Violations of the Texas Insurance Code:** Liberty's actions also amount to a violation of various provisions of the Texas Insurance Code. Liberty is liable to Plaintiffs under Texas Insurance Code Section 542.060 for a penalty of 18% in addition to Plaintiffs' claim plus

attorney's fees for its unreasonable delay in paying the claim. Liberty failed to fully pay the claim within the timeframe set forth in Section 542.058 and is, therefore, liable for the penalty and fees.

JURY DEMAND

13. Plaintiffs previously requested that this case be decided by a jury.

PRAYER

14. Plaintiffs pray that upon final trial of this case they have judgment against Defendant for actual damages, reasonable and necessary attorney's fees, the 18% penalty pursuant to Chapter 542 of the Texas Insurance Code, pre-judgment and post-judgment interest, costs of court, and such other relief to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

/s/Jon Smith

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CERTIFICATE OF SERVICE

I, Jon Michael Smith, do hereby certify that pursuant to Fed.R.Civ.P.5, a true and correct copy of the foregoing document has been forwarded via the Case Management / Electronic Case Files (“CM/ECF”) system and via email on August 1, 2023, to the following counsel of record:

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/s/Jon Smith
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